

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 472 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and  
MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? Yes

2. To be referred to the Reporter or not? Yes @te  
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Yes @ter or not? Yes @ter or not? Yes  
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3. Whether Their Lordships wish to see the fair copy  
of the judgement? No

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge?

No

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KOLI NATHABHAI HARIBHAI

Versus

STATE OF GUJARAT

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Appearance:

MR KB ANANDJIWALA for Petitioner

CORAM : MR.JUSTICE J.N.BHATT and  
MR.JUSTICE A.L.DAVE

Date of decision: 28/08/98

ORAL JUDGEMENT Per Bhatt,J.

Before we deal with, discuss and decide the merits of this appeal, it may be stated first that this appeal was earlier heard by this court and came to be dismissed at the threshold (coram: N.J.Pandya and S.M.Soni,JJ.) on 25.7.1991 which was questioned before the Honourable Apex court by filing Criminal appeal No.322 of 1996 which was allowed and the order impugned before the Honourable Apex court dated 25.7.1991 was set aside and the matter was remitted for fresh disposal by its order dated 10.9.1997.That is how, this matter came to be readmitted in its original number and we were called upon to decide and adjudicate upon, on merits in light of the directions issued by the Honourable Apex court.

The main theme of this appeal is the macabre complicity on the part of the appellant-accused Nathabhai in causing murder not only in unusual way but in a very cruel way ,of his own daughter who was just three years old and that too by throwing her in deep well , snatching away from the mother of the child, which is held proved by the learned Sessions Judge Bhavnagar in sessions case No. 109 of 1989 holding the accused guilty for the offence punishable under section 302 of the IPC, which is assailed by the accused by filing this appeal before us under section 374 of the Code of Criminal Procedure,1973 ('the Code').

Shortly stated, the facts of the prosecution case are that the accused Nathabhai Haribhai who was not on good terms with his wife Jombai ,got a baby girl out of the wed-lock who, unfortunately, was physically handicapped. On 7.7.1989, the accused took his wife Jombai saying that he wanted to take her to village Borvav. Therefore, wife Jombai along with baby girl Bharti started from village Fachra for going to Borvav. They went to Palitana in a tempo. The accused thereafter told his wife that he would like to visit the field of his maternal uncle situated in the outskirts (Sim) of Palitana. Therefore, the accused , his wife and Baby Bharti went to the Sim of Palitane

town.

The marriage between the accused and Jombai was customary second marriage which was also broken owing to bad blood between them. Baby Bharti was with the mother after going to the Sim area. The accused asked his wife to hand over Baby Bharti to him to which his wife strongly countenanced and refused to deliver her. The accused desired to run away to Surat and his wife was not willing to go with him. During the course of their stay in the Sim, one Vashram Rambhai had met them who took them to his residence and as usually it happens in case of rural villager, offered tea at his residence.

After having taken tea, the accused, his wife and baby Bharti started going towards village Fachra and, therefore, they went back to Palitana bus stand from where, they boarded a bus and reached village Rajpara. From the bus stand of Rajpara, the accused and his wife started walking along with Bharti who was with the mother as she was physically handicapped, on way to village Fachra on foot. When they reached near the farm of one Dohabhai, the accused snatched away baby Bharti and mercilessly threw her in the well situated in the farm of Dohabhai. Consequently, wife Jombai started going back to Rajpara instead of returning to Fachra where she informed the Secretary of the cooperative society one Dilarvarsinh who in turn informed some villagers.

Thereafter, Jombai, Dilavarsinh and other villagers went to the well which became tainted with cruel and merciless killing of baby Bharti, in the field of Dohabhai. With the help of torch, they could see the dead body of Bharti floating on the water of the well.

Subsequently, Dilavarsinh went back to village Rajpara and lodged a complaint before the police at Palitana police station. Jombai was escorted by 6-7 Darbars to village Fachra. After the complaint came to be lodged, police started investigation. Firstly, on reaching the venue of offence like that, the well in the field of Dohabhai, unfortunate dead body of Bharti was taken out as she had succumbed to the asphyxia due to drowning in the water as she was thrown by her father.

Upon completion of the investigation, Palitana rural police station charge sheeted the accused for the offence punishable under section 302, IPC before the learned Judicial Magistrate, First class, Palitana who committed the accused to the sessions court at Bhavnagar on

18.8.1989 and the learned Sessions judge in sessions case No.109 of 1989 framed the charge against the accused at exh.2 under section 302,IPC to which the accused denied and claimed to be tried.

In support of the charge,the prosecution placed reliance on 13 prosecution witnesses .The trial court,upon assessment and evaluation of the evidence of prosecution,convicted and sentenced the accused for the offence under section 302 and directed to undergo R.I. for life by his impugned judgment and order dated 11.6.1991 which is under challenge before us in this appeal under section 374 of the Code.

Learned advocate for the appellant Mr. Anandjiwala vehemently submitted before us that the prosecution has not succeeded in proving that the accused is the author of complicity he was charged with. In support of this contention, he has also raised incidentally other submissions and has forcefully contended that evidence of the wife who is the only eye witness does not radiate an imprint of truth and,therefore, it should not have been relied on by the prosecution, more so,when she was of easy virtue and not of good character,in that, it was submitted that the wife may be responsible for killing baby Bharti by throwing her into the well so as to get rid of her. The submissions raised on behalf of the appellant in defence are controverted and the learned Addl.P.P. Mr.Shah has fully supported the impugned judgment and order of the trial court .

We have also been taken through excursion of testimonial collections and documentary evidence adduced before the trial court in the course of submissions before us. We have dispassionately heard the learned advocate appearing for the appellant in defence and the learned Addl.P.P. at greater length.

Needless to state at the outset that the homicidal death of minor Bharti is obviously not in controversy. Apart from that, the prosecution has successfully established , by leading evidence of autopsy surgeon Dr.Rameshgiri Gosai,P.W.1 examined at exh.6.Dr Gosai who conducted the post-mortem on 8.7.1989 at 9 a.m. in Jesar Community Health Centre.According to the evidence of Dr.Gosai and post-mortem report at exh. 7, baby Bharti died due to asphyxia due to drowning. Four marks and injuries noticed by Dr.Gosai are indicated in column No. 7 of the post mortem report as also in his evidence. Thus, the prosecution has successfully established that baby Bharti died homicidal death.

The next question which we are required to answer is - as to who is responsible for homicidal death of baby Bharti. The prosecution case has been that the accused, father of minor Bharti didn't like her on account of strained matrimonial relations and misapprehension as also physical disablement of the baby. The trial court has accepted the case of the prosecution and has held that the accused was the author of the heinous crime of murder of crippled baby Bharti by throwing her into well which was deep, filled with water and that too by snatching her from his wife. This finding and conclusion of the trial court is fully justified and we are satisfied that the prosecution has successfully proved that the accused is the author of the crime of murder of Bharti.

P.W. No.3- Jombai, wife of the accused is examined at exh.10. In her testimony, she has eloquently articulated the circumstances and ultimate throwing of baby Bharti in the well situated in the field of Dohabhai, by her husband-accused, in a quite spontaneous and natural manner and mode. In para 2 of her deposition, we have found that she has clearly testified that her husband after snatching baby Bharti from her, threw her in the well situated in the farm of Dohabhai where her husband had taken her and their daughter. Apart from the natural way in which she has testified incriminating her husband, it is also clear from her testimony that she and her husband not only were not enjoying matrimonial bliss but both were dejected and rejected by each other. The accused was staying at Surat and was engaged in diamond cutting and polishing work where Jombai had not joined him because of bad blood between them.

After having carefully scrutinised and scanned the evidence of eye witness, the mother of baby Bharti and wife of the accused, we have not the slightest doubt in our mind that the author of the culpability of murder of minor Bharti was nobody else but the accused-appellant before us.

Evidence of Jombai was sought to be discredited by the learned Advocate for the accused on the ground that she was of easy virtue and of bad character. Firstly, this submission does not find any material support from the record of the present case on facts. Notwithstanding that, the natural mother of the child even if presumed to be of easy virtue, as alleged, would not ordinarily in the society in which we live in, wrongly implicate her husband in place of real culprit. It can also safely be

concluded that there cannot be presumption on account of conduct of a lady that it was she who could be the author of the crime of murder. Insinuation ipso facto unsupported by the facts from the record merits only rejection and nothing but rejection. Apart from that, credibility or dependability of the testimony of a lady cannot be impeached merely on the ground that she happened to be of bad character, even if it is true. This proposition is very well established. All that the court is required or the anxiety of the court in such factual scenario is to consider the veracity or authenticity of the evidence. The evidence of a witness, more so in case of mother of a child of three years who became the unfortunate victim of crack in the second matrimonial relationship between the parents, cannot be thrown over-board merely on the allegation of she being of easy virtue. We have noticed without any shadow of a doubt that her testimony not only is natural, not only is creditworthy but is quite cogent, coherent, clear and directly connects the accused with the complicity he is charged with. Therefore, the allegations against the evidence of the mother of the deceased and wife of the accused for discrediting her evidence are without any foundation; whereas, in our opinion, her testimony radiates an imprint of truth and she is an eye witness. She is natural mother of baby Bharti and she would not be interested in telling lie and what for? More so, in the factual background wherein she shouldered the responsibility of bringing her daughter up, living separate from her husband-accused. Could she think of finishing her daughter who was at her heart? The positive answer would be in the negative.

Apart from the reliable testimony of P.W. 3 Jombai at exh.10, it is also corroborated by the evidence of P.W 2 Dilavarsinh, at exh.8 who is the complainant. He was working as Secretary of the cooperative society at village Rajpara which was the native place of the wife of the accused and he knew the spouses very well. He was informed by Jombai within an hour on the same day coming walking of her own and apprising Dilarvarsinh of the situation. It was she who voluntarily mentioned and informed this witness that the accused had killed their daughter baby Bharti by throwing her in the well situated in the farm of Dohabhai by snatching the baby from her, as a result of which, in the company of other villagers, all went to the venue near the well and found the dead body of baby Bharti floating on water. It was seen by them in the torch light.

Thereafter, Dilavarsinh on returning back to Rajpara went

to the office of the cooperative society from where he communicated to the Palitana rural police station telephonically and thereafter went to Palitana police with the help of his motor bike. Some of the friends and villagers took Jombai to village Fachra. The complaint was recorded by the police as narrated by Dilavarsinh which is produced at exh. 9. It fully corroborates the version of the complainant and the complainant fully corroborates the testimony of eye witness Jombai.

The contention that P.W. 4 Lasuben has not supported the prosecution case, who is brother's wife of the accused and that there were strained relationship between the spouses and that the evidence of eye witness Jombai is not reliable and that there are some doubtful circumstances, are raised for being rejected, for the simple reason that non-support from the evidence of P.W. 4 Lasuben to the prosecution case does not ipso facto get discredited by her hostile evidence. It may be noted that even in her evidence, it is clear that Darbars of village Rajpara had gone to village Fachra along with Jombai after the incident and on return, these witnesses had also stated that dead body of Bharti was floating on water. Those persons returned to Rajpara at 10 p.m. The evidence of Lasuben supports the prosecution case to an extent. Her hostile attitude to the prosecution case cannot affect the evidence of the eye witness. Her hostile evidence is insignificant and is of no consequence insofar as the main core of the prosecution case is concerned. The prosecution case and the testimony of eye witness is also supported by P.W. 5 Hanubha Ajubha, exh. 15; P.W. 7 Bijalbhai Ukabhai, exh. 17 and P.W. 10 Dashrathsinh Sagubha at exh. 20. On the other hand, P.W. 5 Hanubha Ajuba, panch witness and P.W. 6 Raghubha Vajubha, exh. 16 and P.W. 8 Vashrambhai Rambhai, exh. 18 are relied on by the defence and it was contended that they have not supported the prosecution case and, therefore, the evidence of eye witness Jombai and P.W. 2 Dilarvarsinh becomes doubtful. This submission is neither acceptable nor sustainable apart from being half-hearted.

It is true that prosecution has not successfully established the motive for commission of heinous crime. However, it is a settled proposition of law that there is always some hidden motive in commission of crime but at times, it is not possible for the prosecution to bring it to the surface. However, that does not mean or it cannot be interpreted that credible oral version of the eye witness supported and corroborated by other circumstances shall stand discredited. Motive may play, to an extent, role

in case of circumstantial evidence; whereas, in case of direct evidence, motive pales into insignificance. It is not obligatory or imperative for the prosecution to establish the motive for commission of crime in question where reliable, creditworthy, clear, cogent and direct evidence is available. Therefore, the submission that in absence of motive, cloud of doubt is created insofar as the complicity of the accused in killing his daughter is concerned, requires to be rejected straightaway.

There is one important feature which must engage our attention at this juncture. Of course, it pertains to defence strategy. But it is a settled proposition of law that defence version or a statement under section 313 of the Code however integral part it may have on defence strategy, cannot be overlooked by the court. It has to be taken into consideration along with other evidence, facts and circumstances. The accused, though has raised the plea of alibi has not been able to seriously substantiate it. Therefore, the case of the accused that he was at Surat at the time of the unfortunate incident which took toll of young daughter Bharti is not only not proved but has been disproved by the evidence of prosecution. It is a settled proposition of law that in order to succeed in the plea of alibi as mandated by the provisions of section 103 of the Evidence Act, it must be successfully proved by the accused that it was impossible for him to be in or around the venue of offence at the relevant time. It is impossibility of presence that matters and that must be established and the burden for that is obviously heavily on the shoulder of the accused in view of provisions of section 103 of the Evidence Act and more so by illustration No. 2. The evidence of Lasuben is relied on to substantiate the plea of alibi. It is true that Lasuben who is also a relative of the accused has stated in her evidence that the accused was at Surat at the relevant time. However, the hostile nature of evidence of Lasuben remains discredited by the evidence of the investigating officer P.W. 10 Dashrathsinh Vaghela, exh. 20 who has clearly testified in his evidence, para 4, that upon inquiry and investigation, it was reported that the accused was not at Surat at the relevant time. Therefore, the plea of alibi stands discredited. Apart from that, the accused could have shown by leading evidence of neighbours, relatives or from his employment place in support of his plea that on the day of the incident, he was at Surat. Again, the accused surrendered on 11.7.1989. Therefore, in our opinion, the burden as per provisions of section 103 of the Evidence Act has not been discharged.

We are conscious of the fact that the prosecution ought to succeed on its own strength and not on the weakness of defence strategy. In the present case, the prosecution has successfully established beyond shadow of a doubt that it was the accused and nobody else who was the author of heart stealing crime of killing baby Bharti and that too in a cruel way of throwing her in deep well filled with water at night time and running away. We have no hesitation in our mind that culpability of the accused is succinctly established by the prosecution without any doubt. The appellant is, therefore, rightly held guilty by the trial court for the offence under section 302, IPC.

In view of the discussion of the factual scenario emerging from the record of the present case and analysis of the evidence, and the relevant proposition of law, we are fully satisfied that the impugned judgment and order whereby the accused came to be held guilty for the offence punishable under section 302, IPC and the resultant conviction and sentence of R.I. for life is quite justified requiring no interference in this appeal under section 374 of the Code. Therefore, the appeal on hand at the instance of the appellant-accused merits dismissal and accordingly, it is dismissed.

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